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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

JORGE ALFREDO BAUTISTA,

Defendant and Appellant.

B210379

(Los Angeles County
Super. Ct. No. TA091516)

APPEAL from a judgment of the Superior Court of Los Angeles County,
Ronald V. Skyers, Judge. Affirmed.

Susan K. Keiser, under appointment by the Court of Appeal, for Defendant
and Appellant.

Edmund G. Brown, Jr., Attorney General, Pamela C. Hamanaka, Assistant
Attorney General, Scott A. Taryle and E. Carlos Dominguez, Deputy Attorneys
General, for Plaintiff and Respondent.

In this appeal, Jorge Alfredo Bautista challenges the sufficiency of the evidence to support his convictions for murder and attempted murder, and the jury's finding of a gang enhancement. He also challenges the adequacy of the jury instructions. We affirm.

PROCEDURAL BACKGROUND

A three-count information charged Bautista with the murder of Larina Webb (Pen. Code, § 187),¹ the attempted willful, deliberate, and premeditated murder of Felipe Lopez (§§ 664, 187) and possession of ammunition by a felon (§ 12316, subd. (b)(1)). A gang enhancement under section 186.22, subdivision (b)(1) was alleged with respect to all counts and firearm enhancements under section 12022.53, subdivisions (b), (c), (d), and (e) were alleged with respect to the murder and attempted murder.

Bautista was tried by a jury. The prosecution's theory was that Bautista aided and abetted the murder and the attempted murder. No witness testified for the defense.

The jury found Bautista guilty of murder and attempted murder and found all allegations true. It found that the murder was of the first degree. The court sentenced Bautista on the murder count to 25 years to life, plus an additional 25 years to life for the firearm enhancement. The court imposed and stayed a 10-year gang enhancement. For the attempted murder, the court imposed a concurrent life sentence, plus 25 years to life. The court stayed a 10-year gang enhancement on that count. For possession of ammunition, the court imposed a five-year concurrent sentence, composed of the midterm of two years for the section 12316 violation and the midterm of three years for the gang enhancement. The court

¹ Undesignated statutory citations are to the Penal Code.

terminated Bautista's probation in Los Angeles Superior Court case No. TA079953 and sentenced him to a concurrent term of two years.

Bautista timely appealed.

FACTUAL BACKGROUND

On June 18, 2006, a member of the Watts Vario Grape gang killed Henry Carillo, a member of the Elm Street gang. At approximately 8:00 p.m. on July 4, 2006, four Elm Street gang members -- Rascal, Crow, Serio, and Popeye -- picked up Bautista, himself an Elm Street gang member. When he entered the car, Bautista saw that one person had a rifle and another had a handgun.

At approximately 11:30 p.m. that evening, Larina Webb was shot; she died eight days later of multiple gunshot wounds. Webb's cousin, who was nearby at the time of the shooting, was a member of the Watts Vario Grape gang. At approximately 1:00 a.m. the next morning, Felipe Lopez, a member of the Florencia gang, was shot in an area frequented by Florencia gang members. After the shooting Lopez told a police officer that the shooter said, "this is my neighborhood." Lopez was shot in the leg and survived. At trial, it was undisputed that Bautista was present at both shootings. The prosecution's theory was that another Elm Street gang member was the shooter and that Bautista was an aider and abettor.²

1. Bautista's Tape-Recorded Conversation with Victor Gomez

In a tape-recorded telephone call on July 20, 2006, Bautista was asked by a fellow Elm Street gang member, Victor Gomez, "[w]hat happened with the fools from Grape?" Bautista responded, "we handled them" and said "[w]e're trying to

² While there was conflicting evidence as to whether Bautista and Lopez were current or former members of their respective gangs, we construe the evidence in the light most favorable to the verdict. (*People v. Carter* (2005) 36 Cal.4th 1114, 1156.)

take them . . . little by little . . .” Bautista said, “[w]e did it . . . [o]n the Fourth of July . . .” Bautista further explained, “[w]e . . . smoked a flower fool, we smoked two flowers fool, and then we smoked . . a . . . group of . . . fakes.” “Flowers” referred to members of the Florencia gang. “Fakes” was a derogatory term referring to members of the Watts Vario Grape gang.

2. *Bautista’s Interview with Officer Samuel Marullo*

On July 5, 2007, Officer Samuel Marullo interviewed Bautista. Speaking of the Elm Street gang, Bautista explained: “[Y]ou’re with the friends, and the friends . . . gonna go beat up somebody, and then I’m with them, you know, and I gotto go. I got pumped up you know, I’m with them in my neighborhood.” With respect to the shootings of Webb and Lopez, Bautista said that he was “just watching it [the shooting]. I was just right there with ‘em and that’s it.”

Bautista stated that he got out of the car before the first shooting because he thought he was going to “see some fireworks.” Bautista was right behind the two shooters. The shooters were shooting at “gangsters” and “a lot of people.” Bautista heard several gunshots. After the shooting, Bautista returned to the car because he was scared. The shooting “traumatized” him.

With respect to Lopez’s shooting, Bautista explained that the driver saw “some guys . . . [and] . . . stopped the car . . .” Bautista heard shooting but did not get out of the car. Bautista said he “didn’t have nothing to do with it, and . . . was just . . . watching them doing it.” Bautista also informed Marullo that there was to be a third shooting that night, but “they missed out, and they didn’t do it.” “[T]hey were about to do it, but they didn’t because there were a lot of families.”

3. *Gang Culture and Evidence the Shootings Were Gang Related*

Officer Marullo testified that gang members assist in a “mission,” by being present at a shooting, looking out for each other, making plans, and assisting in getting away. When asked a hypothetical based on the facts of this case, officer

Scott Stevens, a gang expert, opined the crimes were for the benefit of the gang. The murder increased the reputation of the Elm Street gang and was in retaliation for Elm Street gang member Henry Carillo's killing. Stevens testified that the shootings appeared to have been planned, not spur of the moment. Stevens further explained that even without pulling the trigger, showing up for a shooting was putting in work for the gang.

4. *A Search of Bautista's Home Revealed Ammunition*

When detective Marullo searched Bautista's bedroom, he found a .22-caliber bullet and photographs of Elm Street gang members. Stevens opined that possession of such ammunition could benefit Bautista's reputation in the gang. The parties stipulated Bautista suffered a prior felony conviction.

DISCUSSION

Bautista argues the record lacks substantial evidence (1) that he aided and abetted the murder of Webb and the attempted murder of Lopez, and (2) that he committed other crimes benefitting his gang. He also maintains the court erred in failing to instruct the jury on specific intent and should have instructed the jury on felony assault with a deadly weapon. The Attorney General disputes each contention.

1. *Substantial Evidence Supports the Murder and Attempted Murder Convictions*

According to Bautista, the record lacks substantial evidence to support his murder and attempted murder convictions because the evidence shows "he was merely present when his companions shot Webb and Lopez."

In evaluating the sufficiency of the evidence, we "examine the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence -- "evidence that is reasonable, credible and of solid value -- such that a reasonable trier of fact could find the defendant guilty beyond a

reasonable doubt.” (*People v. Kraft* (2000) 23 Cal.4th 978, 1053; *People v. Johnson* (1980) 26 Cal.3d 557, 578.) Testimony from a single witness is sufficient for the proof of any fact. (*People v. Richardson* (2008) 43 Cal.4th 959, 1030-1031.) We presume “in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.” (*People v. Kraft, supra*, 23 Cal.4th at p. 1053.) “““If the circumstances reasonably justify the trier of fact’s findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment. [Citation.]””” (*Id.* at p. 1054.)

Although presence at the scene of a crime is by itself insufficient to establish aiding and abetting liability, it is a circumstance that may be considered in deciding liability. (*People v. Laster* (1971) 18 Cal.App.3d 381, 388 [“while mere presence at the scene of an offense is not sufficient in itself to sustain a conviction, it is a circumstance which will tend to support a finding that an accused was a principal”].) In addition to presence, ““companionship, and conduct before and after the offense”” may also be considered in evaluating whether a defendant aided and abetted a crime. (*People v. Campbell* (1994) 25 Cal.App.4th 402, 409.)

Here, contrary to Bautista’s argument, there was strong evidence that he aided and abetted the shootings. Bautista’s statements to Gomez showed that he participated in the shootings with the goal of taking out the members of Grape. Specifically, when asked what happened “with them fools from Grape ‘G,’” Bautista responded, “we handled them.” Bautista continued, “[w]e’re trying to take them out . . . little by little” The latter statement indicates planning and deliberation. It shows that Bautista identified himself as responsible for the shooting because he used the term “we.” During the course of the conversation, Bautista reaffirmed his role when he stated, “we . . . smoked a flower . . . we

smoked two flowers . . . and then we smoked . . . a gang of . . . fakes,” referring to members of the Watts Vario Grape and Florencia gangs.

The jury could have credited Bautista’s statements to Gomez, even though Bautista’s statements to Marullo differed. We cannot “reweigh the evidence, resolve conflicts in the evidence, draw inferences contrary to the verdict, or reevaluate the credibility of witnesses.” (*People v. Little* (2004) 115 Cal.App.4th 766, 771; see also *People v. Lindberg* (2008) 45 Cal.4th 1, 27 [“If the circumstances reasonably justify the trier of fact’s findings, reversal of the judgment is not warranted simply because the circumstances might also reasonably be reconciled with a contrary finding.”].)

In addition to Bautista’s statements to Gomez, there was other evidence showing that he aided and abetted the murder of Webb and the attempted murder of Lopez. Bautista entered a car with four fellow Elm Street gang members. He saw that two were armed, one with a rifle. He exited the car with fellow gang members at the scene of the Webb shooting. After the shooting, he continued on with the gang members. Bautista stated that another shooting was aborted because of the presence of families, indicating Bautista knew of the plan to shoot people. Throughout this time, knowing that his fellow gang members were armed, that they had shot one person, and that they intended to shoot others, Bautista continued riding with them. His conduct supports a reasonable inference that he was not merely present but encouraged and facilitated the murder and the attempted murder.³

³ Bautista argues that under *People v. Toledo* (1948) 85 Cal.App.2d 577, 580-581, the prosecution was bound by his uncontradicted statements that he was only present at the shootings. In *Toledo*, the court found insufficient evidence to sustain a conviction for manslaughter where defendant’s uncontradicted evidence revealed that he had been attacked by the victim. (*Id.* at pp. 580-583.) The California Supreme Court, however, has held that *Toledo* was based on an “antiquated and

2. *Substantial Evidence the Crimes were Committed with Specific Intent to Promote Criminal Conduct by Gang Members*

Section 186.22, subdivision (b)(1) provides an enhanced punishment for “any person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members” Bautista argues that the section 186.22 gang enhancement was not supported by substantial evidence because there was no evidence “appellant intended to assist gang members in the commission of crimes *other* than the crimes that were the subject of the prosecution.” (Italics added.)

The Ninth Circuit has interpreted section 186.22 to require evidence that a defendant intended to promote, further, or assist in other conduct by gang members. (*Briceno v. Scribner* (9th Cir. 2009) 555 F.3d 1069, 1078; *Garcia v. Carey* (9th Cir. 2005) 395 F.3d 1099.) This court has held otherwise. (*People v. Romero* (2006) 140 Cal.App.4th 15, 19 [rejecting Ninth Circuit’s interpretation and holding that § 186.22, subd. (b)(1) “requires a showing of specific intent to promote, further, or assist in ‘any criminal conduct by gang members,’ rather than *other* criminal conduct.”]; see also *People v. Hill* (2006) 142 Cal.App.4th 770, 774 [“*Garcia* . . . misinterprets California law”]; *People v. Vasquez* (2009) 178 Cal.App.4th 347, 354 [“we reject the Ninth Circuit’s attempt to write additional requirements into the statute”].)

questionable statement of the law.” (*People v. Burney* (2009) 47 Cal.4th 203, 248.) According to the Supreme Court, “[i]n the final analysis the question of defendant’s guilt must be resolved from *all* the evidence considered by the jury.” (*Ibid.*) *Toledo* is inapplicable for a second reason. Bautista’s statements to Marullo that he was merely present were contradicted by his prior statements to Gomez.

The gang enhancement was supported by substantial evidence. As explained above, Bautista's statements to Gomez indicate that he intended to help his fellow gang members commit the shootings. There was evidence that the first shooting was in retaliation for Henry Carillo's killing and that in the second shooting, the assailant indicated it was his neighborhood. (*People v. Leon* (2008)

161 Cal.App.4th 149, 163 [crimes of burglary, and possessing concealed firearm committed with another gang member on rival gang's turf were for benefit of a gang within the meaning of § 186.22]; (*People v. Morales* (2003) 112 Cal.App.4th 1176, 1198 [association with other gang members sufficient to support gang enhancement]; *People v. Olguin* (1994) 31 Cal.App.4th 1355, 1382 [retaliation against rival gang for crossing out graffiti and shouting out gang name constitutes committing an offense for the benefit of a gang within the meaning of § 186.22].) Finally, Bautista's claim that the firearm enhancements must be reversed because those enhancements were dependent on a true finding of the gang enhancement lacks merit because he has not demonstrated any error in the imposition of the gang enhancement.

3. *Bautista Does Not Show the Trial Court Failed to Instruct the Jury that Aiding and Abetting Liability Requires Specific Intent*

Bautista argues the trial court erred in failing to instruct the jury that aiding and abetting liability requires specific intent. Bautista's argument is based on a correct legal principle but is factually inaccurate. "To prove that a defendant is an accomplice . . . the prosecution must show that the defendant acted "with knowledge of the criminal purpose of the perpetrator and with an intent or purpose either of committing, or of encouraging or facilitating commission of, the offense." [Citation.] When the offense charged is a specific intent crime, the accomplice must "share the specific intent of the perpetrator"; this occurs when the accomplice "knows the full extent of the perpetrator's criminal purpose and gives aid or

encouragement with the intent or purpose of facilitating the perpetrator's commission of the crime.” [Citation.]” (*People v. McCoy* (2001) 25 Cal.4th 1111, 1118, italics omitted; see also *People v. Mendoza* (1998) 18 Cal.4th 1114, 1123 [“An aider and abettor . . . must ‘act with knowledge of the criminal purpose of the perpetrator *and* with an intent or purpose either of committing, or of encouraging or facilitating commission of, the offense.’”].)

Bautista's claim that the jury was not instructed on specific intent is belied by the record. The court read CALCRIM No. 401, which states: “To prove that the defendant is guilty of a crime based on aiding and abetting that crime, the People must prove that: [¶] 1. The perpetrator committed the crime; [¶] 2. The defendant knew that the perpetrator intended to commit the crime; [¶] 3. Before or during the commission of the crime, the defendant *intended to* aid and abet the perpetrator in committing the crime [¶] AND [¶] 4. The defendant's words or conduct did in fact aid and abet the perpetrator's commission of the crime. [¶] Someone aids and abets a crime if he or she knows of the perpetrator's unlawful purpose and *he or she specifically intends to*, and does in fact, aid, facilitate, promote, encourage, or instigate the perpetrator's commission of that crime. [¶] . . . [¶] . . . If you conclude that defendant was present at the scene of the crime or failed to prevent the crime, you may consider that fact in determining whether the defendant was an aider and abettor. However, the fact that a person is present at the scene of a crime or fails to prevent the crime does not, by itself, make him an aider and abettor.” (Italics added.) As required, the jury was instructed that in order to find Bautista guilty of aiding and abetting, it must find he specifically intended to facilitate, promote, encourage, or instigate the perpetrator's commission of the crime.

4. *The Trial Court was Not Required to Instruct the Jury on Assault with a Deadly Weapon*

Bautista argues that his conviction for attempted murder should be reversed because the trial court did not sua sponte instruct the jury on the lesser included offense of assault with a deadly weapon. Bautista argues that assault with a deadly weapon constituted a lesser included offense of attempted murder because the jury found true the enhancement that a principle used a firearm in the commission of the crime.

There are two tests for determining a lesser included offense -- the elements test and the accusatory pleading test. “The ‘elements’ test is satisfied if the statutory elements of the greater offense include all the elements of the lesser offense so that the greater offense cannot be committed without committing the lesser offense. [Citation.] The ‘accusatory pleading’ test is satisfied if ‘the facts actually alleged in the accusatory pleading, include all the elements of the lesser offense, such that the greater [offense] cannot be committed without also committing the lesser [offense].’” (*People v. Cook* (2001) 91 Cal.App.4th 910, 918.)

Assault with a firearm is not included within attempted murder under either the elements test or the accusatory pleading test. (*People v. Parks* (2004) 118 Cal.App.4th 1.) The elements test is not satisfied because an attempted murder can be committed without using a deadly weapon. Stated otherwise, assault with a deadly weapon requires proof of an additional element not included in the offense of attempted murder. The accusatory pleading test is not satisfied because enhancements may not be considered as part of an accusatory pleading for purposes of defining lesser included offenses. (*People v. Wolcott* (1983) 34 Cal.3d 92, 96, 100-101 (*Wolcott*); *People v. Parks, supra*, 118 Cal.App.4th at p. 10.) Because our Supreme Court has specifically held that “a ‘use’ enhancement is not

part of the accusatory pleading for the purpose of defining lesser included offenses,” we reject Bautista’s argument. (*Wolcott*, at p. 96.)

Apprendi v. New Jersey (2000) 530 U.S. 466 (*Apprendi*) and its progeny do not compel a different result. Nothing in *Apprendi* contradicts the conclusion in *Wolcott*. *Apprendi*, “grounded on a Fifth Amendment right to due process and Sixth Amendment right to jury trial, requires only that they be tried to a jury and found true beyond a reasonable doubt, which they were.” (*People v. Izaguirre* (2007) 42 Cal.4th 126, 133.) Subsequent to *Apprendi*, our high court has reaffirmed “the long-standing rule that enhancements may not be considered as part of an accusatory pleading for purposes of identifying lesser included offenses.” (*People v. Sloan* (2007) 42 Cal.4th 110, 114; see also *People v. Izaguirre*, *supra*, 42 Cal.4th at p. 130, fn. 4 [“enhancements are not considered part of the accusatory pleading to begin with”].)⁴

Even had we concluded that the trial court should have instructed the jury on assault with a firearm, the error in failing to do so would be harmless beyond a reasonable doubt. The jury necessarily found that Bautista specifically intended to aid and abet the attempted murder. The jury further found the attempted murder was done willfully, deliberately, and with premeditation. Thus, the jury necessarily rejected the theory that Bautista aided and abetted only an assault with

⁴ Bautista argues that a “defendant who is charged with a substantive crime and an enhancement should have the same right to instructions on lesser included offenses” as someone charged only with a substantive crime. Bautista was entitled to instructions on lesser included offenses. However, as explained, assault with a firearm is not a lesser included offense of attempted murder. The fact that a penalty allegation is treated like an element of the crime for some federal constitutional purposes (notably, the *Apprendi* doctrine) does not convert the allegation into an actual element of the charged crime. (*People v. Anderson* (2009) 47 Cal.4th 92, 117.)

a deadly weapon. (*People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1165-1166 [instructional error harmless beyond a reasonable doubt where jury necessarily resolved issue under other instructions].)

DISPOSITION

The judgment is affirmed.

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MANELLA, J.

We concur:

EPSTEIN, P. J.

SUZUKAWA, J.